

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

WILLIAM LAMARTINA,
Plaintiff,
v.
VMWARE, INC., et al.,
Defendants.

Case No. 20-cv-02182-EJD (VKD)

**ORDER RE PLAINTIFF'S MOTION
TO COMPEL PRODUCTION OF
DOCUMENTS WITHHELD AS
PRIVILEGED, AND MOTION TO
SEAL.**

Re: Dkt. Nos. 136, 137, 152, 162

Lead plaintiff Eastern Atlantic States Carpenters Pension Fund (“plaintiff”) moves to compel the production of documents that defendants have withheld from discovery as privileged and/or attorney work product. *See* Dkt. Nos. 137, 146. Defendants oppose the motion. *See* Dkt. No. 144. Upon consideration of the moving and responding papers, as well as the oral arguments presented, the Court grants plaintiff’s motion in part and denies it in part.

I. BACKGROUND

This is a federal securities action, filed on behalf of a putative class, alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5. Defendants are VMware, Inc. (“VMware”), Patrick P. Gelsinger (VMware’s former Chief Executive Officer), and Zane Rowe (VMware’s former Chief Financial Officer). The complaint¹ alleges that defendants violated federal securities laws by deceptively recording sales as backlog in order to delay revenue recognition, thereby creating a false impression of steady sales that did not reflect VMware’s actual performance and concealed potential risks regarding future revenue. *See* Dkt. No. 85. The

¹ The operative pleading is the Third Amended Consolidated Complaint, Dkt. No. 85.

1 complaint also alleges that “[p]rior to the disclosure of the Company’s declining license backlog at
2 the end of Q1 2020, Individual Defendants and other executives unloaded millions in VMware
3 stock . . . at inflated prices[.]” Further, the complaint asserts a claim against Mr. Gelsinger
4 alleging that he engaged in improper insider trading of VMware stock. *See id.* ¶¶ 49, 50, 179-182,
5 242-251. The class is defined as “all persons who purchased VMware common stock during the
6 Class Period [August 24, 2018 to February 27, 2020] and were harmed thereby.” *See id.* ¶¶ 1,
7 217.

8 The present litigation was preceded by an investigation by the Securities and Exchange
9 Commission (“SEC”), culminating in a fine against VMware and a cease-and-desist order stating
10 that VMware’s disclosure in Form 10-Q for Q1 2019 “omitted material information regarding the
11 discretionary nature of VMware’s backlog, the extent to which VMware controlled the amount of
12 its backlog, and how backlog was used to manage the timing of the company’s recognition of total
13 and license revenue.” Dkt 77-1 at 2. Plaintiffs maintain that VMware’s backlog disclosure
14 remained the same throughout the Class Period.

15 The parties dispute whether VMware expressly or impliedly waived the attorney-client
16 privilege or work product protection during the SEC’s investigation and/or in defense of this
17 action, and if so, the scope of any such waiver. In the present discovery motion, plaintiff asks the
18 Court to resolve four issues: (1) whether there has been subject-matter waiver of the attorney-
19 client privilege that extends to 52 documents relating to VMware’s backlog disclosure,²
20 (2) whether the attorney-client privilege has been waived with respect to all documents VMware’s

22 _____
23 ² Plaintiff also argued that by disclosing to the SEC statements reportedly made by
24 PricewaterhouseCoopers partner, Stephane Berthier, in an interview with VMware’s counsel,
25 VMware waived the work product protection, not only with respect to counsel’s memo re Mr.
26 Berthier’s interview, but also to “any withheld interview memoranda concerning [the backlog]
27 disclosure[.]” Dkt. No. 137 at 16 n.13; *see also* Dkt. No. 146 at 10-11. This issue has been
28 resolved. As discussed at the March 5, 2024 hearing, defendants offered to produce counsel’s
memo regarding Mr. Berthier’s interview, with any opinion work product redacted. The Court
ordered defendants to do so, stating that the appropriate result was for defendants to produce the
fact work product from that memo. *See* Dkt. No. 151 at 61-62; *see also id.* at 36-37. Plaintiff has
not convincingly demonstrated that defendants have broadly waived the work product protection
as to every interview memo concerning VMware’s backlog disclosure. As the Court finds no
basis for it, plaintiff’s motion for leave to submit additional documents—namely, the memo re Mr.
Berthier’s interview and a notice for Mr. Berthier’s deposition—is denied.

1 in-house counsel reviewed or considered before issuing any pre-clearance of the individual
2 defendants' insider transactions, (3) whether VMware's in-house counsel—Craig Norris, Amy
3 Olli, and Larry Wainblat—should be included as custodians for discovery purposes, and
4 (4) whether the Court should revisit plaintiff's implied waiver arguments after VMware's Rule
5 30(b)(6) deposition has been taken. The parties principally dispute the first and second issues, as
6 to which plaintiff contends that VMware expressly or impliedly waived the attorney-client
7 privilege with respect to certain documents in its response to the SEC's investigation and in its
8 defense of this action.

9 **II. PLAINTIFF'S MOTION TO SEAL**

10 In connection with the present motion to compel discovery, plaintiff moves to seal
11 information designated "Confidential" or "Highly Confidential — Attorneys' Eyes Only" by
12 defendant VMware and its auditor, non-party PricewaterhouseCoopers LLP ("PwC"). Dkt. No.
13 136. Specifically, plaintiff moves to seal designated portions of its motion to compel (Dkt. No.
14 136-3) and Exhibits A-E and G-J appended to the declaration of Scott Saham (Dkt. Nos. 136-4 to
15 136-12). In response, defendants confirm that they do not seek to seal any portion of plaintiff's
16 motion or Exhibits A, C-E, and G-J to Mr. Saham's declaration. Dkt. No. 143. Defendants take
17 no position on whether sealing is warranted as to Exhibit B, which is a document produced and
18 designated "Confidential" by PwC. *Id.*

19 There is a strong presumption in favor of access by the public to judicial records and
20 documents accompanying dispositive motions that can be overcome only by a showing of
21 "compelling reasons supported by specific factual findings." *Kamakana v. City & Cnty. Of*
22 *Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (internal quotation marks and citation omitted).
23 However, the presumption does not apply equally to a motion addressing matters that are only
24 "tangentially related to the merits of a case," *Ctr. For Auto Safety v. Chrysler Group, LLC*, 809
25 F.3d 1092, 1101 (9th Cir.), cert. denied sub nom *FCA U.S. LLC v. Ctr. For Auto Safety*, 137 S. Ct.
26 38 (2016). A party seeking to seal documents or information in connection with such a motion
27 must meet the lower "good cause" standard of Fed. R. Civ. P. 26(c). *Id.* at 1098-99; *Kamakana*,
28 447 F.3d at 1179-80.

1 As defendants have confirmed that sealing is not required for any portion of plaintiff's
2 motion or Exhibits A, C-E, and G-J, plaintiff's motion to seal those documents is denied. By **June**
3 **24, 2024**, plaintiff shall post unredacted versions of those documents on the public docket.

4 With respect to Exhibit B to Mr. Saham's declaration, the Court has received no response
5 from PwC regarding plaintiff's sealing request; it is not clear whether plaintiff provided notice to
6 PwC regarding the submission of that document in connection with the present motion to compel
7 discovery. In an abundance of caution, as the document in question appears to comprise internal
8 email communications and good cause appearing, the Court grants plaintiff's motion to seal
9 Exhibit B to Mr. Saham's declaration. That document shall remain under seal. In any event, it is
10 not apparent that plaintiff has disclosed the substance of Exhibit B in its motion. The Court also
11 finds it unnecessary to discuss or disclose the substance of that document in resolving the present
12 discovery dispute.

13 **III. LEGAL STANDARD**

14 As this action is premised on federal question jurisdiction, federal common law governs
15 issues of privilege. Fed. R. Evid. 501; *United States v. Ruehle*, 583 F.3d 600, 608 (9th Cir. 2009).

16 “The attorney-client privilege protects confidential communications between attorneys and
17 clients, which are made for the purpose of giving legal advice.” *United States v. Sanmina Corp.*,
18 968 F.3d 1107, 1116 (9th Cir. 2020). The privilege extends to a client's confidential disclosures
19 to an attorney in order to obtain legal advice, as well as an attorney's advice in response to such
20 disclosures. *Ruehle*, 583 F.3d at 607 (citations and quotations omitted).

21 The work product doctrine, codified in Rule 26(b)(3) of the Federal Rules of Civil
22 Procedure, protects from discovery documents and tangible things prepared by a party or his
23 representative in anticipation of litigation or for trial. Fed. R. Civ. P. 26(b)(3); *Sanmina*, 968 F.3d
24 at 1119 (citation omitted). “At its core, the work-product doctrine shelters the mental processes of
25 the attorney, providing a privileged area within which he can analyze and prepare his client's
26 case.” *United States v. Nobles*, 422 U.S. 225, 238 (1975). The doctrine protects both “material
27 prepared by agents for the attorney as well as those prepared by the attorney himself,” *id.* at 238-
28 39, and its primary purpose is to “prevent exploitation of a party's efforts in preparing for

1 litigation,” *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1494 (9th Cir. 1989). Typically,
2 work product protection extends to interview notes, memoranda, summaries, and analyses, as well
3 as to verbatim witness statements. *See Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *Hatamanian*
4 v. *Advanced Micro Devices, Inc.*, No. 14-cv-00226-YGR (JSC), 2016 WL 2606830 at *3 (N.D.
5 Cal. May 6, 2016).

6 The attorney-client privilege may be impliedly or expressly waived. A party “may
7 implicitly waive the privilege by asserting a claim or defense that relies on privileged materials as
8 its basis.” *Dukes v. Wal-Mart Stores, Inc.*, No. 01-cv-2252 CRB (JSC), 2013 WL 1282892, at *6
9 (N.D. Cal. Mar. 26, 2013) (citing *Weil v. Inv./Indicators, Research & Mgmt.*, 647 F.2d 18, 24 (9th
10 Cir. 1981). “In practical terms, this means that parties in litigation may not abuse the privilege by
11 asserting claims the opposing party cannot adequately dispute unless it has access to the privileged
12 materials.” *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003); *see also Chevron Corp. v.*
13 *Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (“Where a party raises a claim which in
14 fairness requires disclosure of the protected communication, the privilege may be implicitly
15 waived.”). By contrast, “[a]n express waiver occurs when a party discloses privileged information
16 to a third party who is not bound by the privilege, or otherwise shows disregard for the privilege
17 by making the information public.” *Bittaker*, 331 F.3d at 719. “A party need not have intended to
18 waive privilege when it made the disclosure,” *Dukes*, 2013 WL 1282892 at *7 (citing *Weil*, 647
19 F.2d at 24), and “an express waiver need not be effectuated by words or accompanied by the
20 litigant’s subjective intent,” *Bittaker*, 331 F.3d at 720 n.4.

21 Work product may be discoverable if the materials meet the requirements of Rule
22 26(b)(1)—i.e., they are relevant and proportional to the needs of the case—and if the party seeking
23 production shows a “substantial need for the materials to prepare its case and cannot, without
24 undue hardship, obtain their substantial equivalent by other means.” Fed. R. Civ. P. 26(b)(3)(A).
25 Upon such a showing, a court must nevertheless “protect against disclosure of the mental
26 impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative
27 concerning the litigation.” Fed. R. Civ. P. 26(b)(3)(B).

28 When a disclosure “is made in a federal proceeding or to a federal office or agency and

1 waives the attorney-client privilege or work product protection, the waiver extends to an
2 undisclosed communication or information in a federal or state proceeding only if “three
3 conditions are met: “(1) the waiver is intentional; (2) the disclosed and undisclosed
4 communications or information concern the same subject matter; and (3) they ought in fairness to
5 be considered together.” Fed. R. Evid. 502(a). “The last requirement—fairness—aims to prevent
6 prejudice to a party and distortion of the judicial process that may be caused by the privilege-
7 holder’s selective disclosure during litigation of otherwise privileged information.” *Dukes*, 2013
8 WL 1282892 at *8 (quotations and citation omitted).

9 **IV. DISCUSSION**

10 **A. Backlog Disclosure³**

11 The parties’ dispute focuses on the overlapping email strings dated June 4-5, 2018
12 submitted as Exhibit D to plaintiff’s motion and as Exhibit 4 to defendants’ opposition. *See* Dkt.
13 No. 151 at 13:4-21. As plaintiff’s Exhibit D appears to be entirely subsumed within defendants’
14 Exhibit 4, the Court will refer to the subject documents simply as “Exhibit 4.”⁴ VMware concedes
15 that it waived the attorney-client privilege when (as demonstrated in Exhibit 4) emails containing
16 privileged communications about VMware’s backlog disclosure were forwarded to VMware’s
17 outside auditor at PwC. *See* Dkt. No. 145-4. However, VMware contends that the disclosure to
18 PwC was an “extrajudicial” waiver that did not waive the privilege beyond the disclosed
19 communications themselves.

20 The “extrajudicial disclosure of an attorney-client communication—one not subsequently
21 used by the client in a judicial proceeding to his adversary’s prejudice—does not waive the
22 privilege as to the undisclosed portions of the communication.” *In re von Bulow*, 828 F.2d 94, 102
23

24 ³ In resolving this issue, the Court finds it unnecessary to consider any documents beyond those
25 submitted by the parties in their original briefing. Defendants’ motion for leave to file
supplemental papers in support of their opposition (Dkt. No. 152) is denied.

26 ⁴ As the bases for the claimed waiver of the attorney-client privilege, plaintiff originally identified
27 documents submitted with its motion as Exhibits A, H, I, and D. However, as discussed at the
hearing, Exhibits A, H, and I do not contain privileged communications in the first instance. *See*
28 Dkt. No. 151 at 6. Accordingly, there has been no waiver (express or implied) by virtue of
disclosure to the SEC or otherwise, or by virtue of defendants’ reliance on those documents for
any purpose.

1 (2d Cir. 1987). “Although it is true that disclosures in the public arena may be ‘one-sided’ or
2 ‘misleading,’ so long as such disclosures are and remain extrajudicial, there is no *legal* prejudice
3 that warrants a broad court-imposed subject matter waiver.” *Id.* at 103. “The reason is that
4 disclosures made in public rather than in court—even if selective—create no risk of *legal*
5 prejudice until put at issue in the litigation by the privilege-holder.” *Id.*; *see also Dukes*, 2013 WL
6 1282892 at *8-9 (no subject-matter waiver where disclosure of privileged communications made
7 to a newspaper, rather than as part of litigation); *Wi-LAN, Inc. v. LG Elecs., Inc.*, No. 10-mc-80254
8 JF (PSG), 2013 WL 685339, at *4 (N.D. Cal. Feb. 25, 2013) (extrajudicial disclosure of privileged
9 letter waived privilege only as to the disclosed letter itself where privilege holder did not use letter
10 in underlying litigation).

11 The Court agrees with defendants that the disclosure of the subject emails to PwC was an
12 extrajudicial waiver of the attorney-client privilege, but that the waiver did not extend beyond the
13 disclosed communications themselves. When VMware later produced those same emails to the
14 SEC during the agency’s investigation, the emails remained non-privileged. The fact that
15 VMware produced the emails to the SEC did not, as plaintiff seems to suggest, result in a *separate*
16 waiver of the privilege. (Defendants have already produced these same emails to plaintiffs in the
17 present litigation.) Thus, the Court finds that the disclosure of these emails to PwC and later to the
18 SEC does not, without more, require a subject matter waiver that extends beyond the emails that
19 were actually disclosed.

20 Plaintiff responds that during the SEC investigation, VMware did not merely disclose these
21 privilege-waived emails to the SEC, but relied on them to defend its position. Plaintiff points out
22 that in VMware’s response to the SEC, VMware cited Exhibit 4, among other documents,⁵ in
23 support of the following statement:

24 Further, as part of VMware’s process for drafting the disclosure, the
25 Company sought feedback from a number of internal and external

26
27 ⁵ There is no indication that other documents VMware cited in footnote 34 of its response to the
28 SEC are or were privileged communications, as descriptions of those documents indicate that they
comprise communications that include non-legal personnel. *See* Dkt. No. 137, Ex. G at 16 n.34.

1 stakeholders, including multiple accounting, financial, and legal
2 professionals. The record contains numerous emails, an internal
3 memorandum, and other documents that reflect these individuals'
4 thoughtful consideration of the disclosure.

5 Dkt. No. 137, Ex. G at 16 & n. 34. In other words, the Exhibit 4 emails are cited as examples of
6 this "thoughtful consideration." *See id.* Additionally, in its response to the SEC, VMware stated
7 that it "acted in good faith" based, in part, on "the reasonable judgment of the Company's finance
8 and legal professionals[.]" *Id.* at 2. Plaintiff contends that the waiver of the privilege in the
9 disclosed Exhibit 4 emails extends to 52 undisclosed documents listed on VMware's privilege log
10 (*see* Dkt. No. 105, Ex. 2) concerning the same subject matter—namely, the drafting of VMware's
11 backlog disclosure in the weeks leading up to the June 11, 2018 filing of VMware's 10-Q with the
12 SEC. *See* Dkt. No. 137 at 8.

13 As discussed above, VMware is correct that none of the Exhibit 4 emails were privileged
14 when they were provided to the SEC. Thus, the mere fact that VMware cited to those already-not-
15 privileged documents in its response to the SEC does not constitute an express waiver beyond the
16 disclosed communications themselves.

17 A closer question is whether an implied waiver was effected by VMware's reliance on its
18 attorneys' "thoughtful consideration," as reflected in Exhibit 4. The Court concludes that this
19 reliance was not an implied waiver. VMware's response to the SEC indicates that VMware was
20 not relying on the substance of underlying legal opinion or advice in Exhibit 4 or elsewhere, but
21 rather on *the fact of consideration* by counsel. *See* Dkt. No. 137, Ex. G at 16. Thus, the Court still
22 finds that the waiver of attorney-client privilege as to Exhibit 4, even as cited in VMware's SEC
23 response, does not extend beyond the disclosed emails themselves.

24 An even closer question is presented by VMware's reliance on the "judgment of the
25 Company's finance and legal professionals," in connection with its arguments to the SEC that
26 VMware "acted in good faith[.]" Dkt. No. 137, Ex. G at 2. This statement does not cite directly
27 to Exhibit 4. However, the statement could be read to imply that VMware's legal counsel, in
28 addition to others, made a judgment that the backlog disclosure would not mislead investors and
VMware acted in good faith in relying on that judgment, at least in part. Unlike *Dukes* (which

1 concerned disclosure to a newspaper) and *In re von Bulow* (which concerned disclosure in a book),
2 VMware's disclosure regarding its reliance on the judgment of "legal professionals" is not
3 extrajudicial; that disclosure was one made to a federal agency in an adversarial context. Thus, the
4 question is whether VMware impliedly waived privilege with respect to the underlying legal
5 advice and communications between and among the Company's in-house attorneys and its senior
6 executives relating to the drafting, editing, and approval of the backlog disclosure, such as the 52
7 logged documents at issue here.

8 Plaintiff does not distinguish between a waiver of privilege with respect to the Exhibit 4
9 documents shared with the SEC and a waiver of privilege implied from arguments VMware made
10 to the SEC. The Court finds this distinction important here. While the cat is clearly out of the bag
11 with respect to the particular communications in Exhibit 4 that VMware sent to PwC and
12 subsequently produced to the SEC, the Court is not persuaded that the waiver extends to
13 undisclosed communications merely because VMware cited Exhibit 4 in a response that also
14 includes a statement that VMware "acted in good faith" based in part on "the reasonable judgment
15 of the Company's . . . legal professionals." In opposing plaintiff's motion, VMware acknowledges
16 that an implied waiver could arise based on arguments it made to the SEC, but it says that it did
17 not assert an advice of counsel defense in the SEC investigation, and the SEC did not treat
18 VMware's statements regarding reliance on the judgment of "legal professionals" as a subject
19 matter waiver or demand production of documents beyond the no-longer-privileged documents
20 VMware disclosed. In support of this argument, VMware relies on *United States v. White*, 887
21 F.2d 267 (D.C. Cir. 1989), in which the D.C. Circuit held that a similar statement regarding a
22 "thorough[] review[]" by counsel did not waive the attorney-client privilege as to undisclosed
23 communications concerning that review. See 887 F.2d at 270. As the *White* court observed:

24 A general assertion lacking substantive content that one's attorney
25 has examined a certain matter is not sufficient to waive the attorney-
26 client privilege. The government acknowledged as much when it
27 admitted at oral argument that if the GSA investigators had followed
28 up [defendant]'s undetailed assertion by asking what his attorneys
had told him, [defendant] at that point still would have been able to
claim his privilege and refuse to answer.

1 *Id.* at 271.

2 While VMware did not merely advise the SEC that it had consulted counsel for advice
3 regarding the backlog issue,⁶ nothing in the record indicates that VMware disclosed to the SEC the
4 substance of the advice it received or that it intended to waive the privilege as to that advice in the
5 SEC investigation. *See* Fed. R. Evid. 502(a) (requiring not only disclosure, but intentional
6 waiver). Moreover, plaintiff has not shown that anything about VMware’s disclosures or
7 arguments before the SEC prejudices plaintiff in *this action*. *See id.* (requiring consideration of
8 fairness). In these circumstances, the Court is not persuaded that VMware impliedly waived its
9 attorney-client privilege beyond the already-disclosed communications in Exhibit 4 by asserting
10 before the SEC that it “acted in good faith” based in part on “the reasonable judgment of the
11 Company’s . . . legal professionals.”

12 Plaintiff next argues that VMware has taken positions in this action that require a finding
13 of waiver. In the present litigation, VMware asserts affirmative defenses that it “fully satisfied its
14 disclosure obligations” and that “[d]efendants are not liable because they did not act with
15 scienter.” *See* Dkt. No. 86 at ECF 38 (fifth and eighth affirmative defenses). However, neither of
16 these defenses expressly relies on advice of counsel, and VMware has disavowed any intention to
17 do so. *See* Dkt. No. 144 at 2, 9. Circumstances may change as the record develops. If VMware
18 later chooses to rely on the judgment of “legal professionals” in this action, such reliance may well
19 result in a waiver of the privilege that would require disclosure of the underlying advice.
20 Alternatively, it may develop that VMware’s decision-making necessarily depended on advice of
21 counsel, and that it cannot rely on a “lack of scienter” defense by pretending it did not. As Judge
22 Orrick explained in *In re Lidoderm Antitrust Litigation*:

23 [D]efendants cannot avoid waiver by offering to rely at summary
24 judgment or trial solely on non-legal justifications for certain
25 subjective beliefs. There is no doubt—given the question at issue is
26 whether anticompetitive goals motivated defendants’ settlement—

27

28 ⁶ VMware’s statement to the SEC regarding the “reasoned judgment” of its “legal professionals”
goes beyond a mere statement that VMware consulted its attorneys. For this reason, the Court
finds that the other cases on which VMware relies, *Planet Aid* and *Aristocrat Leisure*, are
distinguishable.

that business advice and non-legal facts were considered by settlement decision-makers. But if defendants inject their subjective beliefs on specific topics as part of their defense of the Watson settlement—like a subjective belief that patent litigation is inherently uncertain—*where evidence establishes that the subjective belief was also informed by attorney advice*, it would be unfair to not allow plaintiffs access to defendants’ contemporaneous attorney-client information to test the veracity of the defendants’ justifications in this litigation even though that belief is based in part on business judgment and executive experience.

In re Lidoderm Antitrust Litig., No. 14-MD-02521-WHO, 2016 WL 4191612, at *5 (N.D. Cal. Aug. 9, 2016) (emphasis added).

At this time, however, the Court concludes that VMware has not waived its attorney-client privilege, expressly or impliedly, by asserting the fifth and eighth affirmative defenses. Its privileged communications are not discoverable merely because they are related to matters at issue in the litigation. *See id.* at *4 (“[A] simple showing of relevance to a case will not suffice” for waiver); *1st Security Bank of Washington v. Eriksen*, No. 06-cv-1004 RSL, 2007 WL 188881, at *3 (W.D. Wash. Jan. 22, 2007) (“Mere relevance to defendants’ case is not sufficient” for waiver).

As an additional basis for waiver, plaintiff emphasizes that VMware attorneys drafted the backlog disclosure. *See* Dkt. No. 137 at 2, 4, 6. This argument is not persuasive. Attorneys regularly draft documents that are intended to and do become public, and nothing in the record indicates that the privilege has been waived by virtue of the fact that the backlog disclosure was drafted by VMware’s attorneys and then publicly disclosed.

On this record, the Court denies plaintiff’s motion to compel discovery of the 52 undisclosed communications on defendants’ privilege log that purportedly concern the backlog disclosure.

B. Pre-clearance Review

Plaintiff argues that when VMware told the SEC that all trades at issue were pre-cleared by attorneys, the Company, in effect, relied on the advice of its counsel—i.e., the trades were reviewed and cleared by counsel because they complied with applicable legal requirements—and thus waived the attorney-client privilege with respect to that advice and the basis for that advice. *See* Dkt. No. 137 at 9-10 & Ex. G at 28; *see also id.*, Ex. J. VMware maintains that its written

1 response and its presentation to the SEC merely described the fact of its counsel's review and
2 VMware's procedures and processes for the pre-clearance of the subject trades, and did not reveal
3 the substance of any legal advice. VMware maintains that there has been no waiver of the
4 privilege, either express or implied. *See* Dkt. No. 144 at 13.

5 The Court agrees with plaintiff. Although VMware did not reveal to the SEC the actual
6 contents of its attorney-client communications, VMware also did not rely on *the mere fact* that its
7 attorneys conducted and completed a pre-clearance review of the trades at issue. Rather, in its
8 written response and its presentation to the SEC, VMware relied on its counsel's conclusions that
9 the trades were in fact legal because the executives did not have material nonpublic information.
10 Specifically, VMware argued to the SEC that “[a]ll of the trades at issue were executed within the
11 applicable trading window and were precleared by VMware's legal team. *That preclearance was*
12 *predicated on the Company executives not having access to [material nonpublic information] at*
13 *the time of the trades.*” Dkt. No. 137, Ex. G at 28 (emphasis added); *see also id.*, Ex. J
14 (presentation collecting counsel's pre-clearance emails).

15 In this action, defendants have previously taken the position that they lacked scienter, in
16 part, because certain insider trades were executed pursuant to a 10b5-1 trading plan or were
17 otherwise not suspicious. *See* Dkt. No. 64 at 17-18 (motion to dismiss SAC); Dkt. No. 67 at 8
18 (reply re motion to dismiss SAC). At the hearing on the present discovery motion, defendants
19 insisted they will not rely on counsel's pre-clearance of any trades that occurred outside of the
20 trading plan to show lack of scienter. *See* Dkt. No. 151 at 48:9-51:7. The problem is that
21 VMware has already shared with the SEC its counsel's conclusions that certain trades were “pre-
22 cleared” and the bases for those conclusions—i.e., that company executives did not have access to
23 material nonpublic information at the time of those trades. Unlike VMware's statements to the
24 SEC about its backlog disclosure, VMware's statements to the SEC about pre-clearance review
25 reveal the substance of counsel's legal advice. In so doing, VMware waived its attorney-client
26 privilege before the SEC with respect to counsel's pre-clearance review and the conclusion that
27 company executives did not have access to material nonpublic information at the time of the trades
28 in question.

1 VMware's waiver of the privilege in the SEC investigation "extends to an undisclosed
2 communication or information in a federal or state proceeding only if (1) the waiver is intentional;
3 (2) the disclosed and undisclosed communications or information concern the same subject matter;
4 and (3) they ought in fairness to be considered together." Fed. R. Evid. 502(a). With respect to
5 the first factor, VMware's statements to the SEC regarding its counsel's pre-clearance review, on
6 their face, demonstrate that VMware's waiver was intentional. *See generally Dukes*, 2013 WL
7 1282892 at *8 (concluding that defendant intentionally disclosed privileged information by
8 making public statements regarding its counsel's methodology and conclusions). With respect to
9 the second factor, plaintiff seeks more than just information showing the basis for VMware's
10 counsel's conclusion that company executives did not have access to material nonpublic
11 information at the time of the subject trades. Plaintiff wants all information that VMware's
12 counsel considered and reviewed in making the pre-clearance determinations in question. *See*
13 Dkt. No. 146 at 12; Dkt. No. 151 at 38:13-15. With respect to the third factor, it remains to be
14 seen how defendants proceed in this present litigation, although they disclaim any intent to rely on
15 the advice of counsel or VMware's statements or presentation to the SEC. However, Judge Davila
16 has already found that "the timing and amounts of the sales of [Mr.] Gelsinger's and [Mr.] Rowe's
17 trading histories support an inference of scienter." Dkt. No. 84 at 23. In these circumstances, the
18 Court finds that fairness supports a subject-matter waiver encompassing, at a minimum, the
19 undisclosed communications underlying or reflecting the conclusions of Messrs. Norris and
20 Wainblat and/or Ms. Olli that there was no access to material nonpublic information as to the
21 trades at issue. However, the waiver does not extend to all trades; nor does it extend to all reasons
22 for counsel's pre-clearance determinations or to all materials reviewed or considered in making
23 those determinations.

24 Accordingly, the Court finds that defendants have relied on the advice of counsel before
25 the SEC, and, in fairness, plaintiff is entitled to discovery of communications underlying the
26 conclusions of Messrs. Norris and Wainblat and/or Ms. Olli that there was no access to material
27 nonpublic information as to the trades at issue.. *See* Dkt. No. 137 at 10. By **July 17, 2024**,
28 defendants shall produce all such discovery to plaintiffs.

1 **C. Lawyer Custodians**

2 Plaintiff argues that the conduct of VMware's in-house counsel—Craig Norris, Amy Olli,
3 and Larry Wainblat—is at issue in this case and that they should each be included as document
4 custodians for discovery purposes. Plaintiff seeks only documents unique to these lawyers and
5 agrees that defendants may de-duplicate documents prior to production. VMware does not dispute
6 plaintiff's assertion that these lawyers possess relevant information. Rather, VMware's principal
7 objection is one of burden. VMware argues that adding its in-house counsel as custodians would
8 only "impose an enormous burden by requiring privilege review and logging of every relevant
9 document[.]" Dkt. No. 144 at 15. Defendants previously produced a "hit" report based on agreed
10 search terms, apparently covering the Class Period, indicating that files for Ms. Olli and Messrs.
11 Norris and Wainblat total about 2800 documents. *See* Dkt. No. 146 at 13 n.11; *see also* Dkt. No.
12 151 at 62-63, 76.

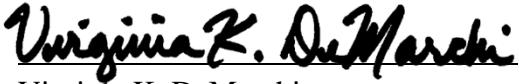
13 As there is no apparent dispute that these attorneys possess relevant information, *see, e.g.*,
14 *Wisk Aero LLC v. Archer Aviation Inc.*, No. 21-cv-02450-WHO (DMR), 2022 WL 524065, at *4
15 (N.D. Cal. Feb. 22, 2022), the Court grants plaintiff's motion to the following extent: By **July 17,**
16 **2024**, VMware shall (1) review the documents identified for Ms. Olli and Messrs. Norris and
17 Wainblat in the previously produced "hit" report, (2) log, as appropriate, any documents claimed
18 to be privileged or otherwise protected from discovery, on its privilege log, and (3) otherwise
19 produce any non-privileged responsive documents to plaintiff.

20 **D. Request to Defer Ruling re Implied Waiver**

21 Although the Court declines plaintiff's request to defer ruling on plaintiff's implied waiver
22 arguments pending the completion of VMware's Rule 30(b)(6) deposition, the Court will not
23 foreclose or preclude plaintiff from seeking further relief regarding VMware's privilege claims if
24 further discovery demonstrates that such relief is warranted.

25 **IT IS SO ORDERED.**

26 Dated: June 17, 2024

27 
28 Virginia K. DeMarchi
United States Magistrate Judge